COURT OF APPEALS OF KENTUCKY

RENDERED: OCTOBER 25, 1974

No. 74-312

JOSEPH RAYMOND VITTITOW - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Warren Circuit Court
Honorable Thomas W. Hines, Judge
No. 14,934

MEMORANDUM OPINION OF THE COURT BY COMMISSIONER CULLEN— AFFIRMING

(Not to be cited as authority)

It is the opinion of this court that the evidence was sufficient to sustain the conviction, the search was valid, and there was no prejudicial error in regard to the admission of evidence.

The judgment is affirmed.

All concur.

Attorney for Appellant:

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Attorney for Appellee:

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MANDATE

THE COMMONWEALTH OF KENTUCKY
The Court of Appeals
74 Term—October 25, 1974

Joseph Raymond Vittitow
v.
Commonwealth of Kentucky

Appeal from a judgment of the Warren Circuit Court #14,934; File # 74-312

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

Frances Jones Mills, C.C.A.

By _____, *D.C.*

Issued February 21, 1975
Appellant's Petition for Rehearing Denied—2/21/75

TRANSCRIPT OF EVIDENCE

Bowling Green, Kentucky
December 12 & 13, 1973

Appearances

For Commonwealth:

Hon. Morris Lowe, Commonwealth Attorney, Bowling Green, Kentucky

For Defendant:

Hon. Phillip Huddleston, Huddleston Brothers, 1032 College, Bowling Green, Kentucky

VOLUME I
December 12 & 13, 1973

PORTIONS OF TESTIMONY OF OFFICER A. E. BURNETT

By Mr. Huddleston:

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Q. 74. Okay. And on the exhibits that came from the clothing of Joseph Vittitow, nothing?

A. One, two and three, nothing of any value.

Q. 75. Nothing. Mr. Burnett, you also saw, examined and took a photograph of a boot print, is that correct, sir?

A. Yes, sir.

Q. 76. I believe you also had available or one of your assistants had available a boot taken from Joseph Vittitow, is that right?

A. True.

Q. 77. Can you match that boot to the print?

A. It doesn't match, no, sir.

Q. 78. It doesn't match?

A. No, sir.

Q. 79. Mr. Burnett, would it be fair to say, based upon your examination of this scene and the evidence that you gathered and that was given

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to you from this scene combined with the abilities of the Kentucky State Laboratory and your effective mobile lab and your twenty-one years of experience, that there's not a thing that you can connect Joseph Vittitow with in this crime?

A. Relative to scientific crime detection, I can't. I don't know what the other officers have.

Q. 80. Okay. You can't?

A. No, sir.

Mr. Huddleston: Thank you, sir. That's all I have.

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CARROLL BEVARLY, having been duly sworn and testifying on behalf of the Commonwealth, testified as follows:

Direct Examination by Hon. Morris Lowe:
(portions of testimony)

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Q. 35. All right, sir. Now, you approached the drugstore from the back?

A. No, I approached it originally from the front; and when I couldn't—didn't notice any activity, then I made my way to the back of the store, yes, sir.

Q. 36. All right, sir. Did you see any strange automobiles in the vicinity at that time?

A. No, sir, there weren't any there.

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Q. 79. Now, were you out in front of the building when (they) saw this car coming down the road?

A. Well, I didn't see the car coming down, but I talked to Mr. Denham about it and told them—told him—in fact, I told the other sheriff's deputies, but I couldn't get them to go and look—going out and looking for a strange car that time of the night, now, is just a little bit tricky. And I couldn't convince the other two deputies that there would be anybody else around that time of the night; but having had some previous experience with this type of—

Mr. Huddleston: Objection, Your Honor. This is hearsay and not admissible and irrelevant.

Mr. Lowe: Well, let me ask him. Let me ask him some questions.

(Objection was not ruled on.)

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VOLUME II
December 13, 1973

(December 13, 1974: Warren Circuit Court Courtroom. At this time the hearing on a Motion to Suppress continues in the Warren Circuit Courtroom outside the hearing of the Jury):

GLEN WOOD, having been duly sworn, testified as follows: (portions of testimony)

Direct Examination by Hon. Phillip Huddleston:

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A. Right, sir.

Q. 101. Now, how many wallets were there,—

A. (Interrupting) Two.

Q. 102. (Continuing)—two or three?

A. Two.

Q. 103. So, if he says three, he's mistaken?

A. Well, two's all I have, sir.

Q. 104. So, if he got three out of the car, he's holding one back?

A. Like I say, two's all I got.

Q. 105. All right. Now, he brought back nothing else besides these things?

A. This was all I was given, sir.

Q. 106. Okay. When you searched Vittitow, did you find any of the loot from the break in on him?

A. No, sir. Not that I could swear was from the break in.

Q. 107. All right. Now, the car—do you have any evidence that indicated to you it was from the break in?

A. The car itself?

Q. 108. No, from the search of Vittitow himself?

A. Well, yes, sir. It all fits in together because of this: the key—

Q. 109. (Interrupting) No, the search of Vittitow. In the search of Vittitow's person, did you find any loot or anything that indicated

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it was taken from the break in?

A. As I stated, sir, none that I could swear that was.

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Q. 128. Now, is it not correct also that this morning about a half an hour to an hour ago, you showed me an envelope that you had forgotten to show me?

A. Yes, sir.

Q. 129. All right. And in that envelope that you had forgotten to show me that you showed me this morning, you said there was a—you showed me a key and said that that was a key that was taken off of

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Eugene Byrns when he was searched and that that key fit the car that Vittitow was driving. Is that correct?

A. Yes, sir.

Mr. Huddleston: All right. Your Honor, that's all I have of Major Wood at this time. I would—while I'm thinking of it, I would like to interpose at this time an objection to any attempt to introduce this key I have just described that was taken off of Eugene Byrns for the reason of failure to comply with the Order of this Court and failure to comply with the Rules of Discovery by the Commonwealth.

The Court: Mr. Lowe.

Mr. Lowe: Judge, he's been showed the key now.

Mr. Huddleston: An hour ago right in the middle of the trial.

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The Court: Motion overruled. Anything else?

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(Portions of testimony of WILLIAM DENHAM, Chief of Police, Smiths Grove, having been duly sworn and testifying on behalf of the Commonwealth.)

Direct Examination by Hon. Morris Lowe:

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... And I said, "Well, get in just a minute". And without any resistance he walked around in front of the car and got in beside me, and we drove down to the drugstore. And Major Woods questioned him a few times. I don't exactly know what he did say to him other than he told him to raise his foot. He raised his foot, and Major Woods placed him under arrest for Storehouse breaking.

Q. 10. Then what happened?

A. He was later brung to the Warren County Jail. I went back—Major Woods got a key when he searched him (Vittitow)—got a key, and asked me to go back to the car and see if the car had any—was locked or see if that key would fit the ignition. And I went over there, and the key did fit the ignition.

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A. I went back to the car. The car wasn't locked. I reached over—I undone the door like that and reached in there to put the key in the car. There was some billfolds and a pair of flip-flop shoes. The billfolds was laying, well, on the passenger side just about half way under the seat.

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Cross-examination continues by Hon. Phillip Huddleston of witness GLEN WOOD: (Portions of testimony)

Q. 147. Major Woods, thinking of your testimony over lunch, I recall you said that you had searched Mr. Vittitow at the time you arrested him. You searched his person and all the clothing he had on, is that right?

A. Yes, sir.

Q. 148. Okay. And everything that you found on him, you took off of him?

A. Yes, sir.

Q. 149. You said you did not find any drugs on Mr. Vittitow, is that right?

A. That's correct.

Q. 150. You didn't find any watches on Mr. Vittitow, is that right?

A. Right.

Q. 151. And you didn't find any of the loot, any loot from the robbery on Mr. Vittitow, is that right?

A. Not that I could swear was, sir.

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Q. 191. I don't recall, Major Wood, whether you were present when Mr. Bevarly testified or not, but are you aware that he testified that there was a boot print or prints of a boot, and he was present when he heard the burglars jump off the back of the roof?

A. Right, sir.

Q. 102. And he went around, and he saw shortly after that the boot print?

A. We, I mean, I didnt hear him testify; but, I mean—in other words, he was there.

Q. 193. He told essentially that same thing?

A. Not of the print. He talked about of the area of hearing someone come off of the roof, yes.

Q. 194. You are not aware that he testified yesterday that this photograph is of the boot print that he found?

A. No, sir.

Q. 195. Mr. Wood, this photograph, the print shown in this, and these boots are not the same, are they?

A. That's correct, sir.

Q. 196. They are not the same, are they?

A. That's correct.

Q. 197. Somebody else made these boot prints, didn't they?

A. That's correct.

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DEFENSE COUNSEL'S MOTION FOR JUDGMENT OF ACQUITTAL

Volume II

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The Court: (Interrupting) Now, we've gone through that, and the Court has moved that the evidence will not be suppressed, and that it is admissible into the Court, in the trial of this case. All right. What's your other point?

Mr. Huddleston: Next, Your Honor, our motion that we would like to be heard on is a motion for a judgment of acquittal on the basis of insufficient evidence, and we'd like to cite to the Court a few cases and instances where the Court of Appeals has held things similar to this to be insufficient to go to the jury. Number one, I'd like to cite the case of Hodges against the Commonwealth. In that case, the Court of Appeals reversed the Barren Circuit Court. In that instance, the proof was that a man named Moore was seen by the City Chief of Police of Cave City leaving or running out of the scene of a burglary, out of a hole that had been dug in the side or the top of the roof. The Chief of Police of the City called for help; and not too long after that, in addition to some citizens, other law en-

forcement officers came, and they began a search of the woods, a wooded area, around the store that was broken into near Cave City. They appre—during their search, they found Moore, who had been seen running from the building or out of the hole, and a man named Hodges, the Appellant in this case, together—sitting together hiding under a log in the woods. And when the policeman hollered at them, they both got up and ran away together.

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And they were both indicted and tried, and Hodges was convicted; and the Court of Appeals reversed the Barren Circuit Court and threw it out saying that's not enough. Guilt by association is not sufficient to go to the jury.

The case of Walker versus the Commonwealth, 472 S. W. 2d starting at page 476, a 1971 case. The Court of Appeals reversed the McCracken Circuit Court and held that evidence that the defendant was found in the company of burglars or people who had perpetrated a burglary sometime after the commission of the offense, a few hours after the commission of the offense; and that a pistol taken in the burglary was found in the possession of one of the other burglars at that time, and that the defendant attempted to conceal his identity by presenting a false drivers license and later ran away and became a fugitive. All of these things combined were not enough, and they reversed the McCracken Circuit Court and threw their case out.

The next case for the Court's consideration is Collinsworth versus the Commonwealth, 476 S. W. 2d, page 201, 1972; and in that case, the Court of Appeals reversed the McGoffin Circuit Court and held that evidence was insufficient. This was an arson case where the evidence was that the defendant was seen going into the barn, staying in there a while, and coming out later; and then sometime after that, the barn was burnt up. And the Court of Appeals held that while the evidence was sufficient to prove that the defendant had gone feloniously into

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the barn. They threw the case out on a charge of arson even though the barn starting burning not too long after he was seen leaving.

Next for the Court's consideration is the case of Thompson versus the Commonwealth, 479 S. W. 2d 583. In that case the Court of Appeals reversed the Jefferson Circuit Court and held where there was—where the defendant was linked to the crime by his—this was a murder case or a homicide case, Your honor—the defendant there was linked to the crime by being married to the victim, being the first one at her body, having removed the death weapon and having his fingerprints on the gun but not shown by a paraffin test that he fired it. That was insufficient evidence to take it to the jury.

These cases and a number of others with similar fact situations have been held by the Court of Appeals to be insufficient for the circuit courts to allow it to go to the jury. In this instance, in this case all we have is a proof—if you give the government its best inferences—is a proof that this defendant associated with—at one time or another associated with a defendant who has plead guilty, Byrns; and that he was in or around the community of Smiths Grove some half a mile away from the drugstore some hour or so after the burglary took place.

This, we submit, is not sufficient to take the case to the jury; and the Court should grant us our motion for a judgment of acquittal.

(Motion was denied by the Court, Vol. II, p. 210.)